

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

COMMENTS

Liberty Productions, Limited Partnership ("Liberty") by its undersigned counsel herewith submits its comments in the above proceeding, as follows:

I. The Commission Lacks Authority To Resolve Mutually Exclusive Applications On The Basis Of A Comparative Selection Process.

1. In its Notice of Proposed Rulemaking the Commission seeks comments inter alia on its proposal to utilize competitive bidding procedures to resolve mutually exclusive broadcast applications filed prior to July 1, 1997, while also seeking comment on whether it should utilize comparative hearings to resolve a subset of those applications. In this regard the Commission states (at para. 13) its conclusion that it is authorized under 47 USC 309(1), as amended, to select among

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mutually exclusive applications filed prior to July 1, 1997 on a comparative, as opposed to a competitive bidding, basis.

2. The Communications Act, as amended by the Balanced Budget Act of 1997, provides:

"If..mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a process of competitive bidding that meets the requirements of this section." (emphasis added)

There no longer exists any provision in the Communications Act, as amended, which would authorize the Commission to award any initial license or construction permit by means of comparative selection, except those specific types of applications explicitly excluded.

3. The Commission purports to rely upon 47 USC 309(1), which specifically addresses applications filed prior to July 1, 1997. However, that subsection simply indicates that "the Commission shall -- (1) have the authority to conduct a competitive bidding proceeding...", not that the Commission has any authority to award broadcast authorizations by means of any comparative selection process. The Commission's erroneous interpretation is premised upon reading into 47 USC 309(1)(1) the phrase "but not the obligation", to wit: 'the Commission shall have the authority but not the obligation to conduct a competitive bidding proceeding' with respect to pre-July, 1997 applications. However, 47 USC 309(1) does not say that. It merely states that the Commission has the authority to utilize

competitive bidding in those cases. It in no way indicates or contemplates that comparative selection remains an option or that the Commission is not otherwise obligated to utilize the competitive bidding process so authorized.

4. If there is any abiguity in this regard, the Conference Report accompanying the Balanced Budget Act makes abundantly clear the fact that:

New section 309(1) of the Communications Act requires the Commission to use competitive bidding to resolve any mutually exclusive applications...that were filed with the Commission prior to July 1, 1997.

See: Congressional Record, at H6173, July 29, 1997. Accordingly, 47 USC 309(1) provides the Commission with no authority to award broadcast authorizations by means of comparative selection and the Commission has pointed to no other source of authority.

II. Reimbursement of Expenses Incurred In Reliance Upon Commission Established Procedures.

5. The Commission should mitigate the damage to pre-July, 1997 applicants by fully reimbursing them for all out of pocket expenses, reasonably and prudently incurred by them in the preparation, filing and prosecution of their applications. Such reimbursement should be funded out of the proceeds of the competitive bidding process. This is especially the case with regard to the twenty cases (identified by the Commission at para. 22) where mutually exclusive applicants have expended significant time and resources to prosecute their applications through

hearings and subsequent appeals in order to allow the Commission to select a permittee on the basis of comparative criteria. Reimbursement of the funds these applicants were improperly induced to expend is the very least that could be expected under such circumstances.

III. Promoting Settlement and Waiver of Settlement Limitations.

6. The Commission proposes (at para. 27) that waivers of its rules and policies regarding settlement should apply only to settlements among pre-July 1, 1997 applicants and then only with respect to settlements filed within the 180 day window.

Likewise, the Commission proposes (at para. 45) only to permit settlements prior to the deadline for submission of Form 175. The Commission's proposals in this regard are unduly restrictive, would not serve the public interest and should not be implemented as proposed.

7. The Commission should in all instances adopt procedures which are designed to encourage the elimination of mutual exclusivity among competing applicants by means of settlement. Such a policy serves the public interest not only by expediting service to the public, but also by avoiding litigation, thereby conserving the Commission's limited resources.

8. In addition to adopting procedures designed to encourage settlement, the Commission also should continue to waive on a case by case basis the limitations on settlements imposed by its rules, at least with respect to all pre-July 1, 1997

applications. In that regard waivers would be warranted and should be granted in all such cases as reflect circumstances analogous to those previously found by the Commission to support waiver of the limitations on settlements. See: Public Notice (FCC 95-391), 10 FCC Rcd. 12182 (1995). As the Commission has previously recognized, the waiver of its limitations on settlement with regard to applicants who prepared, filed and prosecuted their applications with no reasonable expectation of profiting from a settlement would not reward improper speculation or encourage the filing of abusive proposals in the future. Id.

9. It must be emphasized that the Balanced Budget Act of 1997 contains no evidence that Congress intended to restrict the Commission from waiving or modifying its settlement rules. On the contrary, given the fact that Congress has only authorized the use of auctions as a means of resolving mutual exclusivity, its failure to prohibit settlements is indicative of its tacit support for settlements, inasmuch as the elimination of mutual exclusivity through settlement serves to eliminate any basis for an auction. Furthermore, Congress has required the Commission to waive any of its rules that might impede settlement for a period of 180 days. This evidences Congressional support for settlement as an appropriate means of resolving mutual exclusivity.

10. Therefore, inasmuch as the elimination of mutual exclusivity would serve the public interest by expediting the introduction of new service and avoiding litigation, and inasmuch as settlements to eliminate mutual exclusivity not only have not

been prohibited by Congress, but in fact encouraged, the Commission should adopt procedures designed to encourage settlements and should waive its limitations on settlements on a case by case basis under circumstances previously found to warrant such waivers.

IV. Other Issues.

11. The Commission proposes (at para. 16) to refund hearing fees, as well as filing fees of those applicants who choose not to participate in competitive bidding. This proposal should be adopted in light of the changed circumstances.

12. The Commission proposes (at para. 30) to require applicants in cases that were previously designated for hearing to go through the additional procedure of filing FCC Form 175. What possible purpose there could be for this requirement is not stated. Where the Commission already has on file a long-form application there exists no basis, whatsoever, for requiring submission of a short-form application. Any applicant who has already submitted a long-form application should be exempt from further filing requirements and should be accorded the right to bid in any competitive bidding process without further action on its part.

13. The Commission proposes (at para. 34) to provide a period of 30 days after announcement of winning bidder for the submission of amendments and a period of 15 days for response to any petition raising issues regarding the qualifications of the

winning bidder. Commission also should provide for no less than 30 days following the deadline for submission of amendments for the filing of petitions to deny or specify issues.

14. The Commission proposes (at paras. 52-55) to utilize multiple-round remote bidding. Sequential multiple-round auctions, using remote, electronic bidding should be adopted. The Commission should provide for submission of bids by email and provide adequate time between rounds for both the publication and posting on the Commission's internet site of the results of each round of the bidding. The same type of bidding procedure should apply to all broadcast services.

15. The Commission proposes (at para. 56) to require upfront payments and have Mass Media Bureau establish their amount. This proposal should not be adopted. As an initial matter the Mass Media Bureau has no expertise in determining the value of broadcast construction permits and has more important endeavors to consume its limited resources. Furthermore, the penalties provided by Sections 1.2104(g) and 1.2109(c) are sufficient to discourage, as well as punish, the submission of fraudulent or unfunded bids. The burden is on the Commission to establish what incentive a potential bidder would have in not being sincere. If an applicant bids funds it cannot timely remit, it gains nothing and would also be subject to a forfeiture penalty in accordance with 47 CFR 1.2104(g) and 1.2109(c).

16. The Commission seeks comment (at para. 57) regarding whether the establishment of "a reasonable reserve price or a

minimum opening bid" would serve the public interest. If so, the Commission then proposes to have the Mass Media Bureau "work with" the Wireless Bureau to determine how such a price would be established. Neither the establishment of a reserve price or a minimum opening bid would serve the public interest. Neither the Mass Media Bureau nor the Wireless Bureau possesses any expertise, whatsoever, that would allow them to establish the appropriate price in either instance. Furthermore, both Bureaus have more than sufficient duties to occupy their time already and the added burden is unwarranted. Adoption by Congress of a competitive bidding process reflects a recognition that the market can and will best determine the appropriate price. Accordingly, it should be concluded that implementation of the Commission's proposal in this regard would disserve the public interest and constitute an enormous waste of resources.

17. The Commission's proposal (at para. 67) to require electronic filing of FCC Form 175 should not be adopted. Given the relative minor nature of the application, the Commission has not shown any need for dispensing with well established filing procedures. Furthermore, certain types of broadcast applications will have to be accompanied by technical data in order to permit determination as to mutual exclusivity, thus, requiring complex rules to cover different services and types of filings, were electronic filing to be mandated.

18. The Commission's proposal (at para. 69) to defer determinations regarding the acceptability and grantability of an

application until subsequent to the auction, appears to be a workable solution, provided that the Commission strictly enforces the proposed prohibition against major amendments and assures that winning bidders whose complete long-form applications cannot ultimately be granted for either legal or technical reasons are subject to default payments under the Commission's general competitive bidding rules, in accordance with 47 C.F.R. 1.2104(g) and 1.2109(c).

19. The Commission seeks comment (at para. 69) regarding whether, should the disqualification of a winning bidder result in the need for a new auction, submission of new applications should be allowed. The Commission should adopt rules to provide that new applications be allowed only where there remains no qualified applicant from the initial filing window.

20. The Commission seeks comment (at para. 73) on the appropriateness of applying its anticollusion rules. The anticollusion rules should not apply to competitive bidding procedures involving broadcast authorizations in a manner that might serve to discourage removal of mutual exclusivity by settlement.

21. The Commission seeks comments (at para. 74) regarding whether it should apply bid withdrawal and default penalties in accordance with Sections 1.2104(g) and 1.2109 of its Rules. These provisions most certainly should apply with respect to competitive bidding for broadcast authorizations.

22. The Commission seeks comment (at para. 81) regarding its proposal to delete the requirement that applicants have reasonable assurance of site availability and rely instead upon strict enforcement of construction periods. This proposal should be adopted, provided the Commission strictly enforce construction periods. Where a winning bidder fails to complete construction within the specified 18 months, the permit should be forfeited and the second highest bidder should be awarded the permit.

Respectfully Submitted,

LIBERTY PRODUCTIONS,
LIMITED PARTNERSHIP

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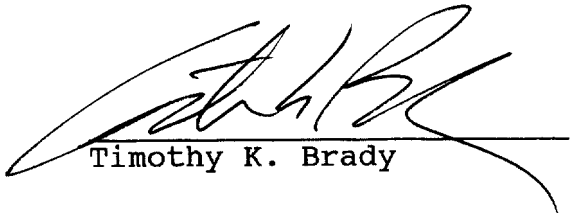
CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have, this 29th
day of January, 1998, served a copy of the foregoing Comments by
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